CENTRAL MALAYSIAN FINANCE BHD.

v.

LETCHUMANAN VELAYUTHAM

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[ORIGINATING SUMMONS NO. 388 OF 1975]
21 JANUARY 1987

LAND LAW: *Foreclosure proceedings - Application for stay - Dismissed due to chargor's absence at hearing - Reasons for absence - Merits of application - National Land Code - Section 136(1)(e).*

The chargor in this foreclosure proceedings filed two applications, the effect of which was to stall the auction of his property that was fixed for the next day - a line of action that has been repeatedly made by him since 1976 when the order for sale was first granted. The auction was repeatedly postponed because there were no bidders or that the chargor successfully obtained a stay.

On a fourth application by the chargor to stay the auction, the Senior Assistant Registrar called off the auction pending the hearing of an application by the chargor to obtain the formal consent of the chargee under s. 136(1)(e) of the National Land Code to enable the relevant authority to finalise and approve the subdivision of the charged land. The chargee appealed against the Senior Assistant Registrar's refusal to fix a revised reserve price and a new date of auction.

The application by the chargor for a stay was dismissed with costs because the chargor did not attend the hearing. It was against this background of events that these two applications by the chargor came up. One application was to have the earlier application reinstated on the ground that the chargor was absent when the earlier application was dismissed. The other application sought to have the auction fixed for the next day stayed.

Held:

[1] As the only ground to have the earlier application reinstated was the absence of the chargor on the date of hearing, the chargor had to satisfy the Court (a) the reason of his absence; and (b) the merits of his application. There is nothing to suggest that the notice of hearing did not reach the chargor or his solicitors. There were also no merits in his application as it was nothing more than another attempt to stall another auction.

[2] As regards the second application, there were no merits why the auction should be stayed.

[Applications dismissed with costs.]

Legislation referred to:
National Land Code 1965, s. 136 (1)(e)

For the chargee - Dason; M/s. Dason & co.
For the chargor - M.A. Vadiveloo; M/s. Veloo & Co.

JUDGMENT

Siti Norma Yaakob J:

The chargor in this foreclosure proceedings filed two applications before me, the effect of which was to stall the auction of his property that was fixed for the next day - a line of action that has been repeatedly been made by him since 1976 when the order for sale was first granted.

On 23 September 1976, Azmi J ordered that the chargor's property be sold by public auction on 20 December 1976 to satisfy a claim of RM1,209,616.80¢, due and owing to the chargee as at 30 June 1976. Dissatisfied with the order of sale, the chargor appealed to the Federal Court which dismissed the appeal with costs on 7 March 1980. However, the chargor obtained conditional leave to appeal to the Privy Council on 19 May 1980 but when he failed to deposit the costs within the time limited, the Federal Court struck out the conditional leave on 15 October 1984.

Whilst the appeal was pending the auction was stayed until 28 May 1982 when the chargee obtained fresh directions for sale and the Senior Assistant Registrar fixed 7 July 1982 as the new date of auction which however was confirmed by the auctioneer as being too short a time within which he could put up the draft proclamation of sale. This resulted in the sale being postponed to 22 November 1982. However, on 18 November 1982, four days before the auction, the chargor succeeded in obtaining a stay of the auction for a period of 60 days.

Well after the lapse of the 60 days and on 12 May 1983, the chargee took further directions and the Senior Assistant Registrar fixed 15 August 1983 as the date of auction. However, on 12 August 1983, 3 days before the auction, the chargor succeeded in getting the sale postponed to enable the Senior Assistant Registrar to enquire as to the exact amount due and owing. The enquiry was fixed for 30 August 1983. When nothing came out of this, a new date of sale was fixed for 10 January 1984, which however proved to be abortive as there were no bidders. A new auction date was fixed for 15 August 1984 which also turned out to be unsuccessful as there were no bidders. The sale was then postponed to 7 November 1984. However, on 1 November 1984, six days before the auction, the chargor applied to have the auction stayed but his application was dismissed with costs. However, the sale that was conducted on 7 November 1984 was again postponed to 9 November 1984 as there were no bidders and the same situation arose again when the property was offered for sale on 9 December 1984.

The auction was then postponed to 9 March 1985, but on the eve of the auction, the chargor, for the fourth time, applied to have the auction fixed for the next day stayed on the ground that terms of compromise had been reached with the chargee. That application, Encl. (121), came before the Senior Assistant Registrar on the morning of the auction and he called off the auction pending the hearing of an application by the chargor, Encl. (109), to obtain the formal consent of the chargee under s. 136(1)(e) National Land Code to enable the relevant authority to finalise and approve the sub-division of the charged land. The chargee appealed against the Senior Assistant Registrar's refusal to fix a revised reserve price and a new date of auction.

Before dealing with the appeal, I had ordered that Encl. (121) be dealt with first but when the chargor did not attend the hearing on 26 November 1985, I dismissed Encl. (121) with costs and directed the Senior Assistant Registrar to give fresh directions for sale. Following this order, the chargee obtained a new date of auction for 11 September 1986.

It was against this background of events that the two applications by the chargor, the subject matter of this appeal came before me on 10 September 1986. One application was to have Encl. (121) reinstated on the ground that when I made the order dismissing it on 26 November 1985, the respondent was absent. The other application, Encl. (150), sought to have the auction fixed for the next day stayed.

As the only ground for having Encl. (121) reinstated was the absence of the chargor on the date of hearing, he therefore needed to satisfy me that (1) the reason of his absence, and (2) merits of his application. The chargor maintained that he was never informed of the hearing date as he had not received any notice of hearing. I find this hard to believe as Counsel for the chargee who was present on 26 November 1985, did receive a notice dated 9 November 1985, from the Senior Assistant Registrar, informing him of the date of hearing of the chargor's application. A carbon copy of the same notice was sent to the chargor's then solicitors, Messrs. Vincent Lia & Co. and in the absence of any evidence, to the contrary, I hold that such notice was sent and received by the chargor's solicitors. Mr. Vadiveloo, the chargor's present solicitor who appeared before me may not be fully aware that since 1975, his client had been represented by seven legal firms namely, Messrs. Sault & Co., S.K. Lingam & Co., Yazid Baba & Co., Skrine & Co., T. Ariarajah & Co., Sri Ram, Zulkifly & Kumar, Vincent Lia & Co., and lastly Messrs. Veloo & Co. who only came into the picture on 18 June 1986.

As at the date of hearing of Encl. (121), Vincent Lia & Co. were the chargor's solicitors on record and since there is nothing to suggest that the notice of hearing had not reached them, the chargor has failed to give me any satisfactory explanation as to his or his solicitor's absence on 26 November 1985.

As to the merit of application, I have already stated before that it was nothing more than another attempt to stall another auction which would have been the fifth attempt had the chargor succeeded. Reference was also made in the application to a so-called agreement of compromise reached with the chargee, the very same reason that was brought forward in 1983 to have the auction fixed for 15 August 1983 stayed.

From the chronological order of events that I have stated above, it is ridiculous that a simple foreclosure proceedings should be allowed to drag for over 11 years. To a large extent the chargor has to take the blame as he has been very obstructive in making last minute attempts to thwart every auction. Added to that, he has been in the habit of changing solicitors and since 1975, has had the benefit or eight legal firms to represent him.

As to the chargor's second application for stay, he has alleged that the proclamation of sale did not comply with the Senior Assistant Registrar's order and the property has not been sufficiently described. Reading the proclamation of sale itself, all that is needed to be stated in such a document appears on the proclamation. The property to be sold has been sufficiently described and the auctioneer who has had the conduct of the sale has affirmed that he has effected all the Senior Assistant Registrar's orders to advertise the sale. It is not that the chargor was unaware that the auction was to take place as this auction was a result of previous abortive auctions and since there were no merits raised why the auction should be stayed, I had also dismissed the chargor's second application with costs.

Also found at [1987] 2 CLJ 225